DATE: April 28, 1995

CASE NO.: 94-INA-00063

In the Matter of:

REUBEN RODRIGUEZ,
Employer

On Behalf of:

HILDA LETICIA PELAEZ-CANAS,
Alien

Appearance: Patricia Piraquive, Law Counsellor
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 9, 1991, Reuben Rodriguez ("Employer") filed an application for labor certification to enable Hilda Leticia Pelaez-Canas ("Alien") to fill the position of Children's Tutor/Houseworker (AF 31). The job duties for the position are:

> Child care, vacuum, dust, clean and sweep floors, do laundry ironing, cook and serve meals.

The requirements for the position are two years of experience in the job offered, and other special requirements are "[h]elp the children with their homework assignments & to reinforce their Spanish culture & language. Cook Spanish dishes."

The CO issued a Notice of Findings on April 28, 1993 (AF 59), proposing to deny certification on the grounds that the Employer's requirement of two years of experience in the job offered is unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2). Specifically, the CO found the normal requirements for this position are six months to one year of experience, according to the *Dictionary of Occupational Titles* (DOT), and gave notice to the Employer that it could rebut the findings by reducing the requirements to the DOT standard, or document the business necessity of the requirement (AF 58).

Accordingly, the Employer was notified that it had until June 2, 1993, to rebut the findings or to cure the defects noted.

In her rebuttal, dated May 28, 1993 (AF 63), the Employer (Mrs. Reuben Rodriguez) contended that based upon her position as a grade school teacher, two years of experience was necessary to be sufficiently knowledgeable about, and to be able to teach Spanish culture and language. The Employer additionally contended that the position includes the duty of cooking Spanish dishes and that the Department of Labor requires two years of experience for any cook that would be working in a commercial setting (AF 63-64).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on June 3, 1993 (AF 66), denying certification because the Employer failed to adequately document that the requirement of two years of experience arises from a business necessity in violation of § 656.21(b)(2).

On July 9, 1993, the Employer's representative requested review of the Denial of Labor Certification (AF 84). On November 15, 1993, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").[2]

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

An employer can establish "business necessity" by showing: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). In rebuttal, the Employer stated that based upon experience as a grade school teacher, the additional experience is needed because the position would have the "sole responsibility and task to teach them [the children] Spanish language and culture," keep the younger boy, who is "unusually restless," "under close supervision at all times," and to perform the duties of cooking Spanish dishes (AF 61-62). The Employer also notes that the Department of Labor requires two years of experience for a cook in commercial settings (AF 62).

Here, the Employer provides a statement, but no independent documentation about why the additional experience is a business necessity. The CO is not required to accept written statements provided in lieu of independent documentation as credible or true, but must consider them and give them the weight they rationally deserve. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). Although the Employer's statements must be considered, assertions and conclusions without supporting reasoning or evidence are generally insufficient to establish business necessity. See *Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989). The Employer states that she bases her requirements on her experience as a grade school teacher, but does not elaborate how that experience has given her the knowledge to evaluate the requirements for teaching Spanish language and culture. Moreover, the CO is correct in finding that the

[2] The file also contains a memo from the CO dated August 2, 1993. This memo is an *ex parte* document and cannot be considered as evidence, and its contents have no bearing on this decision.

Employer's statements in rebuttal appear to heighten the requirements of the position. On the application the position has the special duties of helping the children with their homework assignments and "to ***reinforce*** their Spanish language and culture" (AF 31) (emphasis added). In rebuttal, the Employer states the position will have "***the sole responsibility and task to teach*** them Spanish language and culture" (AF 61) (emphasis added).

The Employer has also stated in rebuttal that the two years of experience is necessary because the position will cook Spanish dishes, and the DOT requires the same amount of experience for cooks in commercial settings. While the DOT states that a "Cook, Specialty, Foreign Food" normally requires two or more years of experience, that evaluation is in relation to working in a commercial capacity in a hotel or restaurant (*Dictionary of Occupational Titles* at 243). Moreover, duties such as "estimating food consumption and requisitioning or purchasing supplies," and "serving food to waiters on order," are duties normally required of a Commercial Specialty Cook and not required of a Child Tutor/Houseworker (*Dictionary of Occupational Titles* at 239).

For the foregoing reasons, we find that the Employer has not established the necessity of the requirement of two years of experience in the job offered.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.